

JURY SELECTION FOR DEATH PENALTY CASES CONFERENCE

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APAAC Training Room
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Practical Tips and Examples: -Picking a Penalty Retrial Jury -Styles and Techniques

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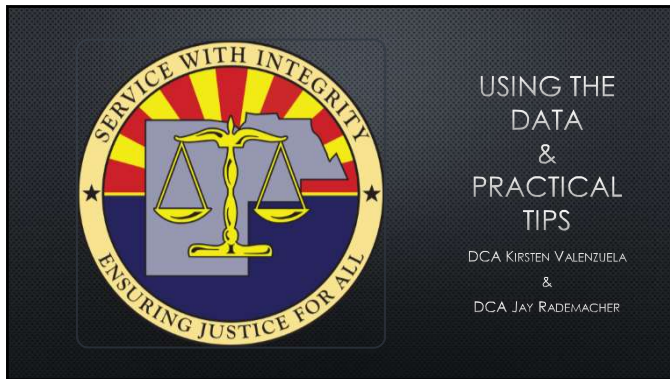
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VOIR DIRE BASICS

- TIME SCREENING
 - 300 TO 500 JURORS
- THEY FILL OUT QUESTIONNAIRE
 - USUALLY WE ASK FOR 12 + 4



"What do we do with all this data we collect on you? Sorry, that's privileged information."

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VOIR DIRE BASICS

- THEY ARE BROUGHT IN FOR SMALL GROUP OR INDIVIDUAL VOIR DIRE DEPENDING ON THE JUDGE. WE PREFER SMALL GROUP.
- THEY ARE BROUGHT BACK ON A FINAL DAY TO MAKE SURE THEY DON'T KNOW EACH OTHER SINCE THEY MAY NOT HAVE ALL BEEN TOGETHER DURING THE TIME SCREENING DAYS.
- PARTIES MAKE THEIR STRIKES AT THE END OF ALL THIS
- 10 STRIKES PER SIDE
- JURY IS SEATED.

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VOIR DIRE GENERAL CONSIDERATIONS

- ALWAYS USE LANGUAGE FROM JURY INSTRUCTIONS
- WE DON'T WEIGH ANYTHING IN A CAPITAL TRIAL
 - WE CONSIDER AND GIVE IT EFFECT
 - DEFENSE = MUST ACT ON IT
 - DEFENSE MIGHT GIVE A HYPO
 - STATE = JUST THINKING ABOUT IS GIVING IT EFFECT

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VOIR DIRE ON SPECIFIC ISSUES

- DRUGS, CHILD ABUSE, SUBSTANCE ABUSE, DOMESTIC VIOLENCE
 - SHOULD JUST BE FOLLOW-UP IF YOUR SJQ WAS GOOD
- ENMUND / TISON ISSUE



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VOIR DIRE ON SPECIFIC ISSUES

- FELONY MURDER
 - USE EXAMPLE NOT SPECIFIC TO YOUR CASE
- PENALTY RE-TRIAL
 - ACCEPTING PRIOR VERDICTS

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VOIR DIRE AND TIME

- GROUP SIZE WILL DICTATE TIME
 - OUR PREFERENCE IS 8 TO 12 JURORS PER PANEL
- LESS TIME HURTS DEFENSE MORE
 - NO TIME FOR COLORADO METHOD



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PRIOR TO TRIAL

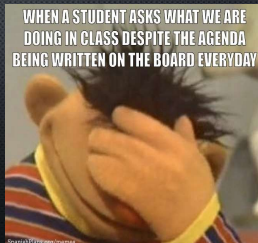
- LITIGATE THE SCOPE OF VOIR DIRE
 - URGE COURT TO USE ITS AUTHORITY UNDER RULE 18.5(e)
- PROHIBIT:
 1. ALL QUESTIONS THAT ASSIGN WEIGHT TO FACTS, MITIGATION, OR AGGRAVATION.
 2. WHAT TYPE OF MITIGATION OR AGGRAVATION EVIDENCE A JUROR WOULD WANT TO HEAR
 3. ARGUING THE CASE OR MAKING STATEMENTS REGARDING DELIBERATIONS
 4. IF HYPOTHETICALS ARE USED THEY MUST FULLY EXPLAIN ALL THE LAW AND CANNOT BE CASE SPECIFIC



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VOIR DIRE

- STATE GOES FIRST
 - GET THE COURT TO READ THE PROCESS TO THE PANEL PRIOR TO QUESTIONING
- MUST EDUCATE THEM ON THE PROCESS AGAIN
 - PRO-DEATH: GET THEM TO COMMIT TO UNDERSTANDING THE PROCESS AND WILL CONSIDER AND GIVE EFFECT TO MITIGATION
 - PRO-LIFE: AGGRAVATION IMPAIRED IS USUALLY GOOD PLACE TO START TO GET A FOR CAUSE STRIKE



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VOIR DIRE

- DEFENSE GOES FIRST
 - WILL LOSE MORE JURORS
 - WILL CONFUSE JURORS
- IF YOU LITIGATE THE SCOPE OF VOIR DIRE YOU WILL DISRUPT THE COLORADO METHOD
 - IT WILL NOT MAKE SENSE AND NOT ACHIEVE WHAT IT IS DESIGNED FOR
 - YOU WILL BE ABLE TO PREDICT THEIR STRIKES OR KNOW WHO THEY DON'T LIKE

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COLORADO METHOD OF CAPITAL VOIR DIRE

GENERALLY:

- JURORS SELECTED ONLY ON THEIR LIFE OR DEATH VIEWS
- PRO-DEATH JURORS ARE QUESTIONED ABOUT THEIR ABILITY TO RESPECT THE DECISIONS OF OTHERS
- PRO-LIFE JURORS ARE QUESTIONED ON BEING ABLE TO BRING A LIFE RESULT
- CHALLENGES ARE PRIORITIZED ON JURORS VIEWS ON PUNISHMENT

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COLORADO METHOD OF CAPITAL VOIR DIRE

- CAPITAL JURY PROJECT
 - 1,198 CAPITAL JURORS INTERVIEWED
 - FROM 353 TRIALS
- STARTED IN 1990
- UNDERLYING PREMISE: SIMILAR CASES, SIMILAR CRIMES MUST ALL RESULT IN SIMILAR VERDICTS
 - IGNORES THE BASIC PRINCIPLE THAT A SENTENCING DECISION IS A INDIVIDUALIZED DECISION

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COLORADO METHOD OF CAPITAL VOIR DIRE

DEFENSE ARGUMENT FOR USE OF THIS METHOD

- MALPRACTICE
- THEIR RESEARCH (CJP):
 - PRO DEATH JURORS WERE FOUND TO BE IMPAIRED AFTER VERDICTS
 - JURORS DON'T UNDERSTAND THE PRINCIPLES THAT GOVERN THE DECISION
 - THEY CONFUSE MITIGATION WITH DEFENSES

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COLORADO METHOD OF CAPITAL VOIR DIRE

- DEFENSE MAY REQUEST AN EVIDENTIARY HEARING
 - WANDA D. FOGLIA
 - ABOUT 50 % OF JURORS DECIDE PUNISHMENT AFTER GUILT PHASE
- BE MINDFUL OF LASTING EFFECTS
 - LACK OF RESEARCH FOR THE STATE

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COLORADO METHOD OF CAPITAL VOIR DIRE

- SCORING SYSTEM
 - THEY SCORE EACH JUROR INITIALLY FROM THE SJQ
 - 1 WILL NEVER VOTE FOR DEATH
 - 7 WILL ALWAYS VOTE FOR DEATH
- IN GROUP VOIR DIRE
 - THEY WILL USUALLY GO AFTER THE JUROR WITH THE HIGHEST SCORE FIRST
 - USE THIS PERSON TO GET LOWERED SCORED JURORS THEY DON'T LIKE TO AGREE

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COLORADO METHOD OF CAPITAL VOIR DIRE

- LANGUAGE
 - MAY ASK THE COURT TO NOT USE "FAIR" OR "APPROPRIATE"
 - BECAUSE IT ENCOURAGES JURORS TO ANSWER IN A SOCIALLY ACCEPTED VIEW
- THEY WILL USE "NO RIGHT OR WRONG ANSWER"
 - ENCOURAGES RESPONSES ABOUT THEIR FEELINGS
 - REINFORCE THAT IT IS OK FOR EVERYONE TO HAVE DIFFERENT PERSPECTIVES

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COLORADO METHOD OF CAPITAL VOIR DIRE

- SETUP OR INTRODUCTION
 - WILL SUMMARIZE THE CHARGES
 - "CART BEFORE THE HORSE" INTRODUCTION
 - ONLY OPPORTUNITY TO SPEAK WITH JURORS
 - NOT TO DRAW ANY CONCLUSIONS ABOUT GUILT
 - ENCOURAGED TO FRONT LOAD MITIGATION IF POSSIBLE IN THE INTRODUCTION

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COLORADO METHOD OF CAPITAL VOIR DIRE

- FIRST STEP: LEARNING THEIR VIEWS ABOUT LIFE AND DEATH
 - INFORMATION GATHERING STAGE
 - HYPOTHETICAL: NOT THIS CASE, YOU HEARD ALL THE EVIDENCE AND YOU WERE CONVINCED THAT DEFENDANT WAS GUILTY OF PREMEDITATED, INTENTIONAL MURDER.
 - MEANT TO DO IT.
 - NOT AN ACCIDENT, SELF-DEFENSE, HEAT OF PASSION, OR INSANITY, ...
 - THEY WILL INSERT CASE SPECIFIC FACTS IN THIS HYPO

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COLORADO METHOD OF CAPITAL VOIR DIRE

- FIRST STEP: LEARNING THEIR VIEWS ABOUT LIFE AND DEATH
 - AFTER HYPO (SPEAK WITH THE HIGHEST SCORED JUROR FIRST)
 - LEADING QUESTIONS IF THEY KNOW JURORS VIEWS
 - OPEN-ENDED QUESTIONS IF THEY DON'T KNOW JURORS VIEWS

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COLORADO METHOD OF CAPITAL VOIR DIRE

- LEADING QUESTIONS IF THEY KNOW JURORS VIEWS
 - PRO DEATH: YOU WOULD AGREE THAT DEATH IS THE ONLY APPROPRIATE PUNISHMENT FOR THIS VILE HUMAN BEING THAT WE ARE TALKING ABOUT IN THE HYPO
 - HELD THESE VIEWS FOR AWHILE
 - THESE VIEWS ARE YOUR PERSONAL MORAL CODE
 - I'M NOT GOING TO BE ABLE TO CHANGE NOR SHOULD I TRY

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COLORADO METHOD OF CAPITAL VOIR DIRE

- OPEN-ENDED QUESTIONS IF THEY DON'T KNOW JURORS VIEWS
 - UNKNOWN: HOW DO YOU FEEL ABOUT A LIFE SENTENCE FOR THIS DEFENDANT IN OUR HYPO
 - IS LIFE A SERIOUS PENALTY FOR A GUILTY KILLER WHO KILLED ... (INSERT THEIR CASE SPECIFIC FACTS)
 - COULD YOU BE MERCIFUL TO SOMEONE WHO KILLED WITHOUT JUSTIFICATION OR EXCUSE
 - DO YOU BELIEVE THAT LIFE CAN BE A HARSH ENOUGH PUNISHMENT AND NOT FEEL THAT YOU ARE GIVING FORGIVENESS OR EXCUSING THE CRIME

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COLORADO METHOD OF CAPITAL VOIR DIRE

- LEADING QUESTIONS TO PROTECT LIFE JURORS
 - YOU WOULD KEEP AN OPEN MIND AND WAIT UNTIL ALL OF THE EVIDENCE IS PRESENTED BEFORE MAKING A DECISION
- DEPENDING ON SJQ:
 - MAY SEEK ANSWERS THAT THEY COULD CONSIDER DEATH PENALTY IN SOME CASES
 - THEY DON'T WANT TO LOSE THEM

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COLORADO METHOD OF CAPITAL VOIR DIRE

- LITIGATE THE HYPOTHESIS OR THEIR FIRST STEP
 - NO CASE SPECIFIC FACTS
- MUST MENTION MITIGATION
 - IF YOU DON'T MENTION MITIGATION IT WILL NOT BE A FOR CAUSE STRIKE
 - WHEN THEY DO IT WILL CONFUSE THEM
- LIMITED CASE SPECIFIC FACTS
 - DON'T BE AFRAID IF FACTS COME IN BECAUSE THIS WILL ALSO IDENTIFY YOUR GOOD JURORS
 - BUT YOU MUST ARM THEM FOR DEFENSE VOIR DIRE

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COLORADO METHOD OF CAPITAL VOIR DIRE

- SECOND STEP: RE-STRIPPING IF NECESSARY
 - DEATH LEANING OR HIGH SCORED JURORS ONLY:
 - STRIP THE CONDITION FOR A LIFE SENTENCE TO GET THEM TO COMMIT TO DEATH
 - ONLY CONDITION FOR YOU NOT TO IMPOSE DEATH IS IF IT WAS AN ACCIDENT
 - LEADING QUESTION:
 - AN ACCIDENT WOULD BE A DEFENSE SO IF NOT AN ACCIDENT THE ONLY APPROPRIATE PENALTY IS DEATH.

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COLORADO METHOD OF CAPITAL VOIR DIRE

- THIRD STEP: RECORD BUILDING
 - DEATH LEANING JURORS:
 - CASE SPECIFIC QUESTIONS
 - IF YOU FOUND DEFENDANT GUILTY OF MURDERING A CHILD, WOULD YOU AUTOMATICALLY VOTE TO IMPOSE DEATH, NO MATTER WHAT THE OTHER FACTS ARE
 - THEY WILL INSIST THEY ARE TALKING ABOUT THE HYPO CASE

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COLORADO METHOD OF CAPITAL VOIR DIRE

- THIRD STEP: RECORD BUILDING
 - DEATH LEANING JURORS
 - MITIGATION SPECIFIC QUESTIONS
 - IF YOU FOUND DEFENDANT GUILTY OF MURDER AND HE WAS PREVIOUSLY CONVICTED OF MURDER, BASED ON YOUR VALUE SYSTEM THE ONLY PENALTY SHOULD BE DEATH SENTENCE
 - YOU WOULD AGREE THAT EVEN BEING ON DRUGS WOULD NOT MITIGATE THIS HORRIFIC HYPO THAT WE HAVE BEEN TALKING ABOUT

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COLORADO METHOD OF CAPITAL VOIR DIRE

- THIRD STEP: RECORD BUILDING
 - LIFE LEANING JURORS: VALIDATE THEIR FEELINGS
 - DID YOU KNOW THAT A PERSON MAY HOLD STRONG FEELINGS THAT CAPITAL PUNISHMENT IS WRONG AND CAN SERVE AS A JUROR ON A CAPITAL CASE?
 - EXPLAIN THAT THE LAW ONLY REQUIRES THEM TO GIVE MEANINGFUL CONSIDERATION TO ALL SENTENCING OPTIONS
 - CAN FOLLOW THE LAW = CAN GIVE MEANINGFUL CONSIDERATION TO ALL OPTIONS

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COLORADO METHOD OF CAPITAL VOIR DIRE

- THIRD STEP: RECORD BUILDING
 - LIFE LEARNING JURORS:
 - EXPLAIN ALL PHASES OF THE TRIAL
 - LAW IS SATISFIED WITH A LIFE VERDICT
 - NOT REQUIRED TO IMPOSE DEATH
 - CAN GIVE THE "WEIGHT OF LIFE" TO ANY ONE MITIGATING CIRCUMSTANCE
 - CONFIRM THAT ONE LIFE VOTE MEANS DEATH IS NOT IMPOSED
 - LAW GIVES NO ANSWER AND EACH JUROR MAKES A PERSONAL MORAL DECISION
 - THEY ALWAYS FORGET IT IS A REASONED DECISION
 - CAN GIVE LIFE EVEN IF THERE ARE MANY AGGRAVATING FACTORS AND NO MITIGATION
 - CONFIRM THAT THEY CAN FOLLOW THE LAW AND NOT LET THEIR FEELINGS GET IN THE WAY

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COLORADO METHOD OF CAPITAL VOIR DIRE

- THIRD STEP: RECORD BUILDING (YOUR SECOND ATTACK)
 - THEY ONLY CARE ABOUT LIFE OR DEATH
 - THEIR RESEARCH IS THAT A MAJORITY OF DEATH JURORS MAKE UP THEIR MIND AFTER GUILT
 - THE LAW IS HEAVILY ON OUR SIDE HERE
 - CAN'T ASK ABOUT SPECIFIC:
 - FACTS OF THE CASE
 - AGGRAVATORS
 - MITIGATION

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COLORADO METHOD OF CAPITAL VOIR DIRE

- THIRD STEP: RECORD BUILDING (YOUR SECOND ATTACK)
 - THIS IS WHERE YOU DO THE MOST DAMAGE TO THIS METHOD
 - WITHOUT EXPLORING SPECIFICS MOST PEOPLE WILL ANSWER THEY CAN BE FAIR AND CONSIDER EVERYTHING
 - DEFENSE WILL ARGUE THEIR ANSWERS ARE NOT THEIR TRUE FEELINGS ABOUT THE DEATH PENALTY
 - BECAUSE JURORS CONFUSE MITIGATION WITH DEFENSES

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COLORADO METHOD OF CAPITAL VOIR DIRE

- FOURTH STEP: PRINCIPLE CONFIRMATION PHASE
 - INSULATION, ISOLATION, AND RESPECT
 - INSULATION: JUROR MAKES WHATEVER DECISION IT IS WITH COMFORT AND IT WILL BE RESPECTED
 - ISOLATION: EACH JUROR MAKES THEIR OWN DECISION
 - RESPECT: EVERY JUROR WILL RESPECT ALL OTHERS EVEN IF THEY DISAGREE

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COLORADO METHOD OF CAPITAL VOIR DIRE

- FOURTH STEP: PRINCIPLE CONFIRMATION PHASE
 - MUST OBTAIN A COMMITMENT FROM EACH PRO-DEATH JUROR THAT HE OR SHE WILL TREAT EVERY JUROR IN A RESPECTFUL MANNER AND WILL NOT PERMIT INTIMIDATION OR BULLYING
 - NOTIFY THE COURT IMMEDIATELY
 - POWERPOINT OR CHART
 - ILLUSTRATING 12 JURORS ONLY IN PENALTY PHASE AND 1 JUROR FOR THE OTHER PHASES

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COLORADO METHOD OF CAPITAL VOIR DIRE

- OTHER ASPECTS THEY MAY EXPLORE
 - FACTUAL DETERMINATION V. MORAL DECISION
 - WAS THE LIGHT GREEN OR RED— WORK TOGETHER TO DETERMINE WHAT HAPPENED
 - PERSONAL MATTERS: ONE'S RELIGIOUS FAITH OR WHETHER TO HAVE CHILDREN— THERE IS NO CORRECT ANSWER
 - GROUP DECISION V. INDIVIDUAL PERSONAL JUDGMENT
 - ALL 12 MUST AGREE ON A VERDICT OR ONE VOTE IN GUILT AND AGGRAVATION PHASE OR IT'S A HUNG JURY
 - IN PENALTY PHASE ITS 12 VOTES THAT CAN BE EITHER LIFE OR DEATH

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COLORADO METHOD OF CAPITAL VOIR DIRE

- OTHER ASPECTS THEY MAY EXPLORE
 - CONFIRM MITIGATION DEFINITION, BURDEN, AND NON-UNANIMITY
 - PRO-DEATH JURORS: UNDERSTAND THE CONCEPT OF MITIGATION AND FOCUS ON RESPECTING DECISIONS OF OTHERS
 - PRO-LIFE: UNDERSTANDS MITIGATION AND CONVEY THE POWER EACH JUROR HAS WITH RESPECT TO MITIGATION

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COLORADO METHOD OF CAPITAL VOIR DIRE

- OTHER ASPECTS THEY MAY EXPLORE
 - LAW NEVER REQUIRES A VOTE FOR DEATH
 - JUDGE IS OKAY WITH WHATEVER YOU DECIDE
 - ONLY PARTY SEEKING THE DEATH PENALTY ARE THE PROSECUTORS
 - NEVER HAVE TO EXPLAIN YOUR FEELINGS

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COLORADO METHOD OF CAPITAL VOIR DIRE

- LAW
 - GENERAL CONSIDERATIONS
 - SJQ: SHOULD COVER ALL CONSTITUTIONALLY REQUIRED QUESTIONS
 - DEFENDANT HAS A RIGHT TO FOLLOW-UP
 - MAJORITY OF CASES ON WHAT NOT TO ASK
 - REVIEWED FOR ABUSE OF DISCRETION FOR TRIAL JUDGE PRECLUDING QUESTIONS

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COLORADO METHOD OF CAPITAL VOIR DIRE

- LAW
 - *MORGAN V. ILLINOIS*, 504 U.S. 719 (1992)
 - QUESTION TO DETECT THOSE WHO WOULD AUTOMATICALLY VOTE FOR DEATH
 - *UNITED STATES V. JOHNSON*, 366 F. Supp.2d 822, 849 (N.D. IOWA 2005)
 - *UNITED STATES V. McVEIGH*, 153 F.3d 1166, 1205-11 (10TH CIR.1998)
 - MORGAN DOES NOT REQUIRE COURTS TO ALLOW QUESTIONS REGARDING THE EVIDENCE EXPECTED TO BE PRESENTED DURING THE GUILT PHASE OF THE TRIAL. FURTHER, WE HAVE HELD THAT MORGAN DOES NOT REQUIRE A COURT TO ALLOW QUESTIONS REGARDING HOW A JUROR WOULD VOTE DURING THE PENALTY PHASE IF PRESENTED WITH SPECIFIC MITIGATING FACTORS.

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COLORADO METHOD OF CAPITAL VOIR DIRE

- LAW
 - *STATE V. GLASSEL*, 211 ARIZ. 33 (2005):
 - QUESTIONS ABOUT SPECIFIC MITIGATION ARE IMPROPER.
 - *STATE V. JOHNSON*, 212 ARIZ. 425 (2006):
 - DEFENDANT WAS NOT ALLOWED TO ASK QUESTIONS ON WHETHER SUBSTANCE ABUSE, DIFFICULT CHILDHOOD, AND PSYCHOLOGICAL PROBLEMS ARE MITIGATING FACTORS.
 - *STATE V. PATTERSON*, 230 ARIZ. 270 (2012):
 - DEFENDANTS ARE NOT ENTITLED TO ASK JURORS WHAT TYPE OF EVIDENCE THEY WILL CONSIDER TO BE MITIGATING.

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COLORADO METHOD OF CAPITAL VOIR DIRE

- LAW
 - *STATE V. BURNS*, 237 ARIZ. 1, 12 (2015):
 - DEFENDANT CAN'T ASK WHETHER THEY WILL VOTE FOR DEATH ON SPECIFIC AGGRAVATING FACTORS.
 - *STATE V. SMITH*, 215 ARIZ. 221, 230, (2007):
 - CAN'T ASK A JUROR TO PROVIDE AN OPINION AS TO WHAT IT WOULD TAKE TO MEET THE SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY STANDARD.
 - *STATE V. HULSEY*, 243 ARIZ. 367 (2018):
 - COURT DID NOT ABUSE ITS DISCRETION IN STRIKING A JUROR WHO GAVE INCONSISTENT ANSWERS ON WHETHER HE COULD IMPOSE THE DEATH PENALTY.

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COLORADO METHOD OF CAPITAL VOIR DIRE

- LAW (HYPOTHETICALS)
 - *STATE V. PATTERSON*, 230 ARIZ. 270 (2012)
 - TRIAL COURT DID NOT ABUSE ITS DISCRETION TO REQUIRE DEFENDANT TO MENTION MITIGATION IN HYPOTHETICAL QUESTION
 - MUST LITIGATE DEFENDANT'S HYPOTHETICAL
 - *STATE V. BURNS*, 237 ARIZ. 1, 12 (2015)
 - "BUT HE WAS NOT ENTITLED TO ASK WHETHER THEY WOULD IMPOSE THE DEATH PENALTY BASED ON THE SPECIFIC FACTS OF HIS CASE."

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COLORADO METHOD OF CAPITAL VOIR DIRE

- LAW (HYPOTHETICALS-CASE SPECIFIC INFORMATION)
 - *STATE V. GARCIA*, 224 ARIZ. 1, 9 (2010)
 - PROPER TO ASK A JUROR A FOLLOW THE LAW QUESTION REGARDING FELONY MURDER AND IMPOSITION OF THE DEATH PENALTY ON A PARTICIPANT THAT DID NOT KILL THE VICTIM
 - *STATE V. PRINCE*, 226 ARIZ.AT 529 (2011)
 - A JUROR STATED HE OR SHE COULD IMPOSE THE DEATH PENALTY IN A "WELL-THOUGHT-OUT CRIME". THE PROSECUTOR FOLLOWED THAT QUESTIONS WITH LIMITED CASE SPECIFIC FACTS TO DETERMINE WHETHER THE JUROR COULD CONSIDER DEATH IN THAT CASE.

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COLORADO METHOD OF CAPITAL VOIR DIRE

- LAW
 - *STATE V. ANDRIANO*, 215 ARIZ. 497 (2007)
 - JURORS HAVE A DUTY TO DELIBERATE IN THE PENALTY PHASE OF A TRIAL
 - *STATE V. OLAGUE*, 240 ARIZ. 475, 480 (APP. 2016)
 - THE OLAGUE COURT CITING *JACOBSON V. HENDERSON*, 765 F.2D 12, 15 (2D CIR. 1985) STATED: "[A]RTICULATE JURORS MAY INTIMIDATE THE INARTICULATE, [AND] THE AGGRESSIVE MAY UNDULY INFLUENCE THE DOILE," BUT SUCH DYNAMICS ARE AN ACCEPTED PART OF THE DELIBERATIVE PROCESS."

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DEFENSE VOIR DIRE

- POSSIBLE OBJECTIONS
 - SHE ADDS THE 3RD PHASE INTO THE HYPO DISCREETLY
 - ALSO ADDS SOME MITIGATION TO SHOW MERCY
 - FINISHES WITH DEATH IS ONLY PUNISHMENT
 - DRUNK OR HIGH AT THE TIME – MITIGATION
 - INTRODUCES MITIGATION – WOULD LISTEN TO DEFENDANT BEING SPANKED BUT WOULDN'T CONSIDER IT
 - IS HE REALLY NOT CONSIDERING IT OR IS SEEING NO NEXUS AND GIVING LITTLE TO NO EFFECT



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DEFENSE VOIR DIRE

- HEARD ALL EVIDENCE OF KILLING A POLICE OFFICER WHO WAS IN THE LINE OF DUTY
- THIS IS NOT A HYPO – IT'S THE CRIME AND THE FACTS OF THE CASE
 - SOME JUDGES WOULD REQUIRE HIM TO ADD MITIGATION TO THIS "HYPO"
 - NOT ENOUGH FOR CAUSE



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DEFENSE VOIR DIRE

- DEFENSE IS CONDITIONING
 - INNOCENT CHILD
 - JUST ASKING ABOUT AGE?



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DEFENSE VOIR DIRE

- AN EXAMPLE WHERE WE WERE ABLE TO LITIGATE THEIR HYPO
 - DIFFERENCES ?
 - GENERIC FACTS WITHOUT FLUFF
 - YES ≠ CAUSE
 - JUROR 3 – WAS NOT STRUCK



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STATE'S VOIR DIRE

- Start with explaining the process
 - Get commitments from your panel that they can wait until the end
 - Will consider and give effect to mitigation
- Why?
 - When defense goes next your jurors listening to the hypo will respond
 - I want to hear everything before the decision, or
 - Are we not supposed to wait to make that decision



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STATE'S VOIR DIRE

- When the State goes second
 - Prevent any strikes for cause
 - Makes Defense look like they are tricking them



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QUESTIONS?

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